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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

THE AMERICAN UNION OF BAPTISTS, INC.,
EUGENE F. OSBORNE, SR.,
and
MELVIN B. GLADDING

Petitioners,

v.

THE TRUSTEES OF THE PARTICULAR PRIMITIVE BAPTIST CHURCH AT BLACK ROCK, INC.,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of Maryland

REPLY TO RESPONDENTS' OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Introduction

Petitioners herein, The American Union of Baptists, Inc., Eugene F. Osborne, Sr., and Melvin B. Gladding, have petitioned this Court for a writ of certiorari to the Court of Appeals of Maryland. They have contended that, in a decision dated June 28, 1994, and reported at 644 A.2d 1063, see Petition for Certiorari ("Cert. Pet.") at 1a-16a, the highest court of the State of Maryland misconstrued the First and Fourteenth Amendments to the Constitution of the United States, and thereby deprived them of fundamental constitutional rights.

Respondents, the Trustees of the Particular Primitive Baptist Church at Black Rock, Inc., oppose the Petition. Respondents have chosen not, however, to address or to rebut Petitioners' constitutional arguments. They have not attempted to reply to Petitioners' submission that the court below acted in a way inconsistent with the teachings of this Court. Rather, Respondents rely solely on procedural issues: on the argument that the questions that Petitioners now raise were not properly preserved during review before the State courts in Maryland.

Petitioners now respectfully reply to the Brief in Opposition of Respondents ("Op. Cert."), pursuant to Rule 15.5 of the Rules of this Court. They submit that Respondents' position is devoid of support in the caselaw,[1] and that it turns on a reading of the facts that finds no comfort in the record. Petitioners raise important issues of constitutional law that deserve serious consideration; it would be a shame were that consideration denied in reliance on representations that the facts and law of this case are very different from those actually presented by the Petition.

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[1] Respondents cite not one single precedent of this Court or any other court in their Brief in Opposition.

1. There Is No Requirement That Constitutional Infirmities in Lower Court Judgments Be "Preserved" for Review by This Court

The gravamen of Respondents' case is that Petitioners have not "preserved for review" the substantive constitutional issues discussed in their Petition for certiorari. Respondents apparently consider this argument to be so strong that they state it three times, in slightly different language. In its second and third iterations, the argument is that Petitioners have somehow "conceded" so much of the case by their conduct below (i.e., by what they did and did not challenge before the State courts), that review here by certiorari would be "inappropriate," or, alternatively, that so many issues were "waived" by Petitioners below as to make the issues presented "mere academic question[s]."

But no matter how many times it is stated, and no matter how distorted a rendition of the record of the case below is cited in its support, Respondents' argument fails as a matter of law, for one simple reason: there is no requirement that a petitioner "preserve" constitutional issues for discretionary review by this Court. That is, no matter what the nature of the challenge that Petitioners raised before the Maryland Court of Appeals to the ruling of the lower courts of the State, the issue before this Court is constitutional scrutiny of the judgment of the former. The constitutional infirmities of **that judgment** are what give rise to Petitioners' claim, and what they respectfully ask this Court to revisit and to correct. This Court does not sit as a court of appeals limited to reconsideration of the arguments presented by litigants to lower tribunals. It is a reviewer of judicial acts, and it is empowered to test those acts by the measure of the Constitution. That, not reconsideration of arguments attempted unsuccessfully below, is what Petitioners now seek.

This Court has the authority to review by writ of certiorari any decision of the highest court of a State, inter alia,

> where the validity of a statute of any State is drawn into question on the ground of its being repugnant to the Constitution . . . of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . of the United States.

28 U.S.C. § 1257(a). Until the judgment whose review is sought is issued by the lower court, of course, it cannot be evident whether these prerequisites are met. The Court of Appeals of Maryland determined in the case at bar -- erroneously, in Petitioners' view, for the reasons elaborated in the Petition -- that it could not adjudicate the dispute presented to it, because of what it understood to be the strictures of the First Amendment. But the correctness of that view, which is at issue here, cannot have been a question presented for any court's determination until the view was expressed.

The requirement that Respondents seek to have the Court impose apparently would have asked Petitioners to present their argument that the Constitution permits (indeed, mandates) resolution of the dispute on the merits to the Maryland Court of Appeals itself (or, perhaps, to one of the lower courts). But there was no reason for Petitioners to do so until the last court entered its ruling that it was barred from reaching the merits. The effect of Respondents' novel argument, therefore, would be to require a petitioner for discretionary review before this Court to seek rehearing or reconsideration in the court below. This is not the law: it is inconsistent with the Rules of this Court, and with its jurisprudence.[2]

Thus, for example, in Cohen v. Cowles Media Co., 501 U.S. 663 (1991), it was held "irrelevant to this Court's jurisdiction

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[2] Reconsideration in any event was sought by Petitioners in this case, however, and it was denied on August 19, 1994. See Cert. Pet., 1a.

whether a party raised below and argued a federal-law issue that the state supreme court actually considered and decided." 501 U.S. 663, 667 (citations omitted). That the Minnesota Supreme Court expressly based its holding on a perceived violation of the of the First Amendment ipso facto conferred jurisdiction on this Court to review that constitutional adjudication. See also Victor v. Nebraska, ___ U.S. ___, 114 S. Ct. 1239, 1249 (1994) (that the last State court considered a constitutional issue meant that this Court could review that judgment, even though the defendant himself failed to raise the issue at trial or on appeal).

In the case at bar, the decision to be reviewed is based squarely in the realm of constitutional interpretation. The reason given by the Maryland Court of Appeals for declining to reach the merits of the dispute between the parties was that "[t]he Constitution will not permit such inquiries." Cert. Pet., 16a. It does not matter, therefore, in determining this Court's authority to hear the instant case whether or not the constitutional issue was "preserved," in the sense in which a party must "preserve" an objection or an argument at trial in order to include it in her appeal. What matters is that the court below disposed of the case in reliance -- even if erroneous reliance -- on the Constitution. That is the teaching of Cohen and Victor, and it means that the authority of this Court to grant the writ and to review and reverse the judgment below is beyond dispute.

2. Even if "Preservation" of Arguments Is Required, Petitioners Did All That Was Necessary To Guard Their Rights

Respondents' contention seems to be that Petitioners failed to assert below that the Maryland courts could not constitutionally abstain from ruling on the merits of this case, a dispute over control of real property that happens to be owned by a church. From this premise, Respondents invite the inference that the constitutional issues cannot be raised here. But even a

cursory review of the procedural history of this matter shows that such a contention is simply in error.

Under Maryland law, this dispute between two factions of a church's corporate board was first submitted to arbitration. Md. Code, Corps. & Ass'ns § 5-310. The issue to be decided was the validity of the meeting of certain individuals purporting to act for the Board of Trustees of the Particular Primitive Baptist Church at Black Rock, Inc., on June 13, 1987, and of certain actions that they claim to have taken at that meeting. The arbitrators, over a dissent, concluded that the meeting and the actions were valid, and that Respondents were entitled to be considered the Board of Trustees. See Cert. Pet., 28a-44a.

Appeal was duly taken to the Circuit Court for Wicomico County, which summarily adopted the report of the majority of the arbitral panel. Cert. Pet., 25a-27a. A further appeal was addressed to the Court of Special Appeals, which decided the case not on the merits, but on the premise that the statutory dictum that arbitrators' decisions are "final" (Md. Code, C & A § 5-310(c)) means that they cannot be reviewed by the courts at all. Cert. Pet., 17a-24a. Petitioners requested and were granted a writ of certiorari by the Maryland Court of Appeals.

To their instant Brief in Opposition, Respondents attach the memorandum submitted by Petitioners to the State's highest appellate court. The purpose of this, presumably, is to demonstrate that no constitutional argument was made there. And that is absolutely correct: Petitioners argued instead for the preliminary point that the arbitrators' report was judicially reviewable (since the decision below was based expressly and exclusively on the proposition that it was not), and on the merits that the report itself was "completely irrational and palpably mistaken."[3] The latter contention was based on, among others, the

[3] These standards are taken from Maryland caselaw. An arbitral award is to be overturned if it is "completely irrational," O-S Corporation v. Samuel A. Kroll, Inc., 348 A.2d 870 (Md. 1975), or if there is "a palpable mistake of law or fact apparent on the face of the award or a mistake so gross as to work manifest

arbitrators' apparent conclusion that five people can constitute a majority of a board comprising ten members. That proposition is quite literally not rational, and it is obviously erroneous as a matter of both language and arithmetic.

It was the Court of Appeals, after finding the basis on which the Court of Special Appeals had affirmed the trial court to have been in error, that determined it necessary to resolve the matter in terms of perceived First Amendment concerns. Cert. Pet., 1a-16a. That court too held that it was precluded from conducting a judicial review of the arbitrators' report, not because of its "finality," but because to do so would "require an impermissible entangling of church and state." Cert. Pet., 12a.

The appellate court's ruling, in Petitioners' submission, is erroneous as a matter of constitutional interpretation. Further, in purporting to deny Petitioners any judicial consideration of their dispute, the judgment also deprives them of property without due process of law. This is because the State courts' "abstinence" from their proper judicial role does not leave the underlying dispute unresolved: it leaves it resolved in favor of one of the contesting parties, in this case Respondents.

If, on the other hand, the State courts' approach to the case, as reflected finally in the decision of the Court of Appeals, was correct, then, in Petitioners' argument, the statute that established the framework for review must itself be unconstitutional, because it is that statute which directs the courts to conduct their assessment according to "the custom and usage of the church." This was precisely the direction that the Court of Appeals held itself constitutionally prohibited from carrying out.

It was not incumbent upon Petitioners to raise constitutional arguments prior to the Court of Appeals' conclusion that the Constitution barred its declaring the arbitrators' plain error to be plain error. Petitioners acted properly to preserve their

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injustice." Board of Education of Prince George's County v. Prince George's County Educators' Ass'n, Inc., 522 A.2d 931 (Md. 1987).

rights, and have properly presented these constitutional issues for review by this Court.

3. Petitioners' Constitutional Arguments Are In No Way Rebutted by Respondents' Opposition

As noted, Respondents make no effort to join issue with Petitioners on any of their constitutional claims. They do not attempt to defend the conclusion of the Maryland Court of Appeals that it could not determine whether five is a majority of ten without excessively entangling itself in a "theological thicket." Cert. Pet., 12a. They do not address the question whether more than "neutral principles" are needed to interpret the language of the Bylaws of the Board of Trustees, or the Articles of Incorporation of the church.[4]

Respondents do not try to reconcile the decision below with the teaching of this Court in numerous cases, such as Jones v. Wolf, 443 U.S. 595 (1979), that, so long as doctrinal matters are scrupulously avoided, the judicial branch may and indeed must adjudicate cases, properly presented, involving church property disputes. They do not present reasons why the purely secular, corporate-law issues presented by Petitioners to the arbitrators and then to the courts are in actuality or fundamentally ecclesiastical questions in benign and secular disguise.

Nor, of course, do Respondents deign to address the second and third of the Questions Presented: whether, if the Court of Appeals was wrong and it could constitutionally have heard the dispute but refused to do so, Petitioners were denied due process of law by their eviction from the courthouse; and whether, if the court below was right and the case really does lie outside its power of judicial review, the statute making it so is not itself constitutionally defective.

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[4] The questions that had to be addressed are listed in Cert. Pet., 16-17. The relevant sections of the Bylaws are at Cert. Pet., 51a-52a, and of the Articles at Cert. Pet., 48a-50a.

Respondents' answer to these points is procedural only, and inadequate at that.

4. Respondents Significantly Misstate the Record

Respondents do try, however, to defend the indefensible, by proffering an explanation of how five can be a majority of ten. The problem here, however, is that the tendered explanation is based on a plain misreading of the record, and is so clearly wrong that the explanation itself becomes further support for Petitioners' contention that justice requires judicial review.

There is no doubt but that, on June 13, 1987, there were ten Trustees of the Church at Black Rock. See Cert. Pet. 30a-31a.[5] There is no doubt but that, exercising their statutory power to "[d]etermin[e] the number of members necessary to constitute a quorum," Md. Code, C & A § 5-306(a)(5)(ii), Cert. Pet., 45a, the Trustees established "a majority of its members then serving" to be a quorum for the conduct of business. Cert. Pet., 49a. And there is no doubt but that the meeting of June 13, 1987 was attended by five Trustees.

It follows as plainly as can be that the meeting did not have a majority of the membership in attendance, and therefore did not have a quorum. The actions purportedly taken at the meeting, including the "removal" of Petitioner Osborne from the Board, and the "election" of new Trustees, were therefore ultra vires and without legal validity.[6]

In their "defense," Respondents proffer two explanations: that the term of Petitioner Osborne as a Trustee had ended (and so the full membership was nine, not ten), or that "the term of

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[5] The arbitrators' report lists 11 Trustees for the period 1983-87, but it is undisputed that Elder Wood died in July 1985. Cert. Pet., 3.

[6] The lack of a quorum is only one of at least six reasons why the measures purportedly adopted at the meeting were of no legal effect. The others are listed at Cert. Pet., 16-17, and are analyzed at Cert. Pet., 17-21. In particular, even a quorum of the Trustees had no authority to remove a member or elect a new one. See the Articles of Incorporation, Cert. Pet., 48a-52a.

another Trustee had ended due to his poor health and incompetence" (presumably, with the same result). Op. Cert., 10 n. 3. The problem with these contentions, however, is that they are inconsistent with the Articles of Incorporation and the Bylaws.[7]

The Board membership of Petitioner Osborne did **not** lapse in 1987, since, under the Articles, when any vacancy is not filled by special election (which Respondents do not claim occurred here), "the Trustees then serving shall hold over until an election and seating of Trustees is completed." Article III, Cert. Pet., 49a. Moreover, if Osborne's term expired and his position became vacant, then so did those of all of the members, including those who attended the June 13, 1987 meeting, since all ten were elected at the same time. See Cert. Pet., 30a-31a. And there is no basis at all in the record for Respondents' latter contention, that any other Trustee had been removed or had resigned by virtue of incapacity.

A majority of a Board of Trustees with ten members is six. The meeting of June 13, 1987 did not have six Trustees in attendance. And even, of course, if there were some way of resolving the matter of the "majority," Respondents would still have to justify the courts' refusal to address the other deficiencies in the meeting and actions of the Trustees, none of which requires delving into matters of faith.

This case is simpler as a matter of fact, and more complex as a matter of law, than Respondents would have this Court believe. On the record of the decisions below, it is plain that Petitioners were entitled to and were denied judicial review of a "completely irrational and palpably mistaken" report of an arbitral panel, for the sole reason that such review would allegedly involve the court in an unconstitutional entanglement with

[7] The unsupportable suggestion that Osborne's term had expired appears to have originated with the arbitrators' report, which puts forward that contention without reference to evidence, and without addressing the fact that all ten Trustees were elected at once. Cert. Pet., 43a.

religion. That conclusion was an erroneous interpretation of this Court's precedents and of constitutional law, and Petitioners' only avenue for redress is now the requested writ of certiorari to the Court of Appeals of Maryland. Respondents' Brief in Opposition provides no legally adequate defense of the disposition of this case below.

Conclusion

For all of the foregoing reasons, as well as for those stated in their Petition for Certiorari, Petitioners The American Union of Baptists, et al., respectfully urge that the writ should be granted, and the decision below reviewed and reversed.

Respectfully submitted,

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